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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 123

MAR DE PASSY CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (R. 32–38), and its supplemental opinion on motion for a new trial (R. 39–42), are reported in 37 F. Supp. 141.

JURISDICTION

The judgment of the Court of Claims was entered November 12, 1941 (R. 38). A motion for new trial was overruled March 3, 1941 (R. 39–42). The petition for a writ of certiorari was filed June 3, 1941. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether a structure, extraneous to the original hull, which the United States placed upon certain of its warships as a protection against torpedoes, infringes Patent No. 1,599,311 for improvements in the hulls of marine vessels.

STATUTE INVOLVED

The Act of June 25, 1910, 36 Stat. 851, as amended by the Act of July 1, 1918, c. 114, 40 Stat. 705 (35 U. S. C., sec. 68), provides:

> Whenever an invention described in and covered by a patent of the United States shall be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture. The Court of Claims shall not entertain a suit or award compensation under the provisions of this section where the claim for compensation is based on the use or manufacture by or for the United States of any article owned, leased, used by, or in the possession of the United States prior to June 25, 1910. In any such suit the United States may avail itself of any and all defenses, general or special, that might be pleaded by a defendant in an action for infringement, as set forth in this chapter, or otherwise. The benefits of the

provisions of this section shall not inure to any patentee who, when he makes such claim, is in the employment or service of the Government of the United States, or the assignee of any such patentee. This section shall not apply to any device discovered or invented by such employee during the time of his employment or service.

STATEMENT

Petitioner, the Mar de Passy Corporation, is the assignee of patent No. 1,599,311, granted September 6, 1926, to Rochus Max zu Lynar Passy de Chimang, for improvements in marine vessels, and more particularly the hulls thereof (R. 14). On July 18, 1934, petitioner filed suit in the Court of Claims for compensation charging that its patent was infringed by the defendant's use upon certain of its warships of structures, called "blisters," extraneous to the normal hull of the ship placed thereon, as the court below found (R. 23, 33), primarily for protection against torpedoes (R. 1–6). Without passing upon the validity of the patent, which was held to be a combination patent, the court dismissed the petition, holding that there was no infringement (R. 38). A motion for a new trial was overruled (R. 42).

The facts, as found by the court below, may be summarized as follows:

The claims of the patent cover as its outstanding features a marine vessel having a hull provided

with a "bulkhead structure surrounding the bottom and part of the sides of said hull, the bulkhead structure having a bottom rising from its bow end to its stern end," the bottom being "shaped to provide a longitudinal and inwardly extending recess" (R. 35). The stated objects were to provide better cleavage of the water; to reduce the amount of submerged surface or draft of the vessel, whereby its speed would be increased; to provide the hull with bulkheads designed to steady the vessel and prevent careening, rolling, and pitching; and to provide a free and solid flow of water to the propellers for their efficient operation (R. 14–15). The patent contains no suggestion or showing that protection from torpedo attack or other exterior explosion was within the concept of the inventor (R. 18).

The "blisters" alleged to infringe petitioner's patent are an outer protective armor comprising a metallic shell shaped for adjustment at their lower edges to the sides of the normal hull at the region of the ship known as the "turn of the bilge" or where the ship's sides join the bottom, the upper edges of the blisters being secured to the hull a suitable distance above the water line (R. 23, 33). The bow and stern ends of the blisters are tapered or streamlined into the lines of the hull to reduce resistance (R. 23). In no instance did they extend under or surround the normal hull (R. 33). They were placed upon respondent's ships after the latter were built and in commission, their addi-

tion being one of the changes effected in the modernization program undertaken by respondent (R. 32, 33). The use of oil instead of coal for fuel and the replacement of old boilers were among the other changes made (R. 32). In two cases, the effect of modernization was to increase the speed of the vessels, but there was no evidence to show that the addition of the blisters increased the speed (R. 32, 37, 41).

The structure used by respondent, unlike that claimed in the patent, does not have (1) a bulkhead structure which surrounds the bottom and parts of the side of the hull; (2) a bulkhead structure, the bottom of which arises from the bow end to the stern end; and (3) a longitudinal and inwardly extending recess (R. 25, 35, 40–51).

To those skilled in the art, the use of blisters for protection against torpedoes and mines was well known more than two years prior to the original application for the patent in suit (R. 31, 36–37). The prior art also disclosed instances in which the addition of blisters increased the buoyancy and decreased the draft of the vessel (R. 31–32, 36). The evidence showed no instance of any use of petitioner's patent since the date of its issuance (R. 38).

ARGUMENT

The findings and conclusion of the court below are in accord with those reached by the Commissioner before whom the evidence was adduced and

they are clearly correct (R. 34). Petitioner fails to show that the blisters used by respondent do not differ from the combination claimed in the patent in the three respects specified by the court. Each of those differences would alone support the judgment. Walker, *Patents* (Dellers Ed.), pp. 1695–1697.

Except for the fact that the United States was the defendant in the court below, this suit is an ordinary patent case. No issue of serious concern to the public or of importance in the administration of the patent laws is presented, the sole question being whether petitioner's patent, if valid, was infringed. It is well settled in such circumstances that a writ of certiorari will not be granted unless necessary to reconcile conflicting decisions "on the same patent". *Keller* v. *Adams-Campbell Co.*, 264 U. S. 314, 319–320; *Layne & Co.* v. *Western Well Works*, 261 U. S. 387, 393; *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178–179. The decision of the court below is not claimed to be in conflict with that of any other court upon the patent here involved.[1]

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[1] The numerous cases cited by petitioner involve other patents and the principles for which they are invoked are inapplicable to the facts herein. They deal with the substitution of equivalents in combination patents (Pet. 24, 25, 27); the addition of some element to an existing patent to improve performance (Pet. 25–26); and the doctrine that basic patents are to be construed liberally (Pet. 27).

CONCLUSION

For the above reasons the petition for a writ of certiorari should be denied.

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